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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD,
PUBLIC ADMINISTRATOR,

Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Respondent requests this Court decline to grant Certiorari to review a decree of the Court of Appeals of the State of New York of November 27, 1979, which decree affirmed the Order of the Appellate Division.

Opinions Below

The opinions below are as set forth in Petitioner's brief (hereinafter P.Br.). The judgment entered on the Order of the Appellate Division, First Judicial Department, appears in Appendix A to this brief. The judgment entered on the decree and remittitur of the Court of Appeals of New York appears at Appendix B to this brief.

Jurisdiction

This Respondent does not differ with the jurisdictional claim of Petitioner.

Question Presented

Should this Court grant the Writ requested by Petitioner when two Appellate Courts of the State of New York, applying the governing Federal Maritime Law, have found the proof of the Petitioner insufficient to sustain a verdict when viewed in connection with the acts of the decedent, and when Petitioner's own uncontradicted proof in the Trial Court demonstrated that irrespective of any of the foregoing, that the decedent could not have survived the force of the seas, so as to render any acts allegedly independent of the Master's own conduct, not proximately related to his demise as a matter of law.

Statutes Involved

46 U.S.C. § 688, The Jones Act, *see* P.Br. Appendix F.

45 U.S.C. §§ 51 *et seq.*, The Federal Employers' Liability Act, *see* P.Br. Appendix F.

Former 46 U.S.C. §§ 85 *et seq.*, The Loadline Law, is reproduced in pertinent part in Appendix C to this brief.

46 U.S.C. §§ 761 *et seq.*, The Death on the High Seas Act, is reproduced in pertinent part in Appendix C to this brief.

McKinney, The Estates, Powers & Trusts Law (1967), Sec. 5-4.3.

Statement of the Case

The action dismissed by the Appellate Division, was instituted by Petitioner pursuant to three Federal statutes: The Jones Act, *supra* 2; The Death on the High Seas Act, *supra* 2; and the Loadline Law, *supra* 2. Petitioner also asserted a cause of action pursuant to *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970).

As noted, suit was instituted by Petitioner pursuant to the Loadline Law. The Amended Complaint of Petitioner paragraph 24, sets forth the following (Tr.[1] A9):

> "That suit herein is brought under but not limited to Title 46 Section 85-85(g), a safety statute of the United States, which because of *defendant shipowner's violation of its various sections* as aforementioned, creates a presumption of negligence on the part of the shipowner." (emphasis added)

Notwithstanding the foregoing (and Petitioner's recital in his brief[2] before the New York Court of Appeals, hereinafter P.Br. NYCA, at pages 21-22 and 76), Petitioner nonetheless relegates the veritable core of this case in the prior Appellate Courts to a footnote before this Court (P.Br. 4, fn. 3).

Simply put,[3] it was the position of the Petitioner before the Trial Court, that a vessel loaded to its summer

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[1] References to "Tr." indicate pages in the record of the proceedings in the Court below, filed with this Court by Petitioner.

[2] The briefs of both Plaintiff-Appellant and Defendant-Respondent before the New York Court of Appeals have been filed with this Court by Petitioner.

[3] The statement of facts before the New York Court of Appeals constituted a lengthy presentation. Accordingly, this Court is respectfully referred, should it be appropriate, to the "Statement of the Case" as set forth in the brief of this Respondent before the New York Court of Appeals at pp. 9-43 (hereinafter R.Br. NYCA).

marks, entered the winter zone of the North Pacific, under the command of the decedent. That this overloaded vessel[4] encountered heavy seas, and that by virtue of its overload, it was caused to sustain severe damage. It was further contended by the Petitioner that the overloading of the vessel, which was attributed to Respondent[5], constituted a violation of law (Tr. A436-37). It was Petitioner's further contention that Master Blume, while inspecting the severe damage as induced by the overloaded condition of the vessel, was caused to perish.

Inasmuch as the Petitioner is in agreement with the Trial Court's excision from the case of the issues of the responsibility for the loading and course-setting, as he set forth that position before the New York Court of Appeals (P.Br. NYCA 27), then it is established for all purposes, that the presence of the overloaded vessel in the winter zone was the sole responsibility of Master Blume. Since it was Petitioner's further contention before the Trial Court, that had the vessel not been overloaded at the time of the temporary loss of rudder control, the vessel would not have sustained *severe* damage, mandates the conclusion that it was the decedent himself who had responsibility for that which caused this damage and which resulted in the loss of his life.

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[4] This caused the vessel (apart from the effect of the seas upon its decks pushing the vessel deeper) to be at least, seven or eight inches deeper in the water than it should have been (Tr. A338).

[5] The Court's attention is respectfully directed to that portion of the record, wherein it was Petitioner's contention before the Trial Court that it was not the Master who had responsibility for the loading and the course-setting, but that rather, the Master was in a "mental strait-jacket" (Tr. A590; 592-94), as limited by his amount of fuel (Tr. A586-88; 1433-35; 1477), and by prior operational norms (Tr. A590-91; 1549).

After eleven days of trial, the cause was submitted to the jury. The jury's verdict was the only result it could have reached, based upon the charge of the Trial Court which removed from its consideration for any and all purposes (Tr. A1581-82), the loading of the S.S. WASHINGTON TRADER, the course set by the decedent, and its entry into the winter zone overloaded (Tr. A1554-55). To the jury's verdict was added prejudgment interest by the Trial Court, in the amount of $499,255.62.

Accordingly, the matter before this Court involves more than just a recitation of isolated occurrences seemingly unrelated to the aforementioned activities of the decedent.

Notwithstanding that the Appellate Division reversed the judgment and dismissed the Complaint on grounds wholly apart from the sufficiency or appropriateness of the charge to the jury, Petitioner sets forth that the Appellate Division (P.Br. 5):

> ". . . expressed no disagreement with the trial court's legal rulings or with its jury instructions . . ."

Of course, the Appellate Division did not reach this determination, notwithstanding that the Trial Court's charge formed an important portion of Respondent's appeal to the Appellate Division.[6]

Dealing directly with that which appears to form the core of Petitioner's application to this Court, Petitioner asserts (P.Br. 5):

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[6] As set forth in Respondent's brief before the New York Court of Appeals (R.Br. NYCA 54-58), various charges of the Trial Court were such as to, in any event, disable the Court of Appeals from reinstating the jury's verdict, even if it otherwise had the ability to do so. Cf. dissenting opinion of Judge Fuchsberg, P.Br. App. 5b.

"In particular, despite clear record evidence to the contrary, the Appellate Division purported to find 'no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16th' shortly before the Master was lost. Pet. App. 2a. Similarly, the appellate court claimed to find in the record 'no evidence that the crew members should have known that the Master was washed overboard . . .' (Pet. App. 4a), although there was in fact testimony that certainly so indicated. And the court dismissed as 'sheer speculation' any 'finding that a defective storm rail on the poop deck contributed to the Master's loss . . .' because there was 'no proof . . . that Master Blume went overboard in an area where the railing was defective'; the court ventured from certain testimony in the record the alternative theory that 'the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea.' Pet. App. 3a. In short, the Appellate Division overturned the jury's verdict on the basis of its own reading of the record." (footnote reference omitted)

The record is clear, that the immediate consequence of the rudder failure while the vessel was broaching to, was not massive damage to the vessel. This *severe* damage as per Petitioner's own contention, was caused by the overloaded condition of the vessel. Further, it is to be noted and as Petitioner correctly points out (P.Br. 13, fn. 19), in a seaworthiness case the burden is one of "a direct causal relationship between the defect complained of and the ultimate loss". Moreover, *viewing the rudder loss most favorably to the Petitioner,* can it be said ". . . were it not for

this condition, the loss would not have been sustained.", as the Trial Court did charge[7] (Tr. A1595).

With respect to the remaining contentions of the Petitioner, as they relate to the Appellate Division's finding that any defective storm rail could not have contributed to the Master's loss, these are both resolved solely by a review of the evidence of record, the evidence on which the Appellate Division made its findings.

In this regard, it should be noted that the Appellate Division indicated (P.Br. App. 3a):

> "In fact, *plaintiff's expert testified* that the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea. Therefore, any finding that a defective storm railing on the poop deck contributed to the Master's loss is *sheer speculation.*" (emphasis added)

As noted above, Petitioner demonstrated by a preponderance of the evidence, that Master Blume would have been knocked unconscious into the seas present on the day in question. Notwithstanding this clear and uncontradicted proof, he sets before this Court the proposition (P.Br. 5):

> ". . . the court (Appellate Division) ventured from certain testimony in the record *the alternative theory* that 'the Master could have been knocked unconscious against the railing or bulkhead or washed directly into the sea.'" (emphasis added)

It is respectfully submitted that there was no *alternative theory.*

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[7] The Trial Justice instructed the jury at one point that the loss of rudder occurred on December 13th and not on December 16th (Tr. A1428).

The Court is also respectfully directed to the following evidence of record, *all* of which was adduced and made part of the record now before this Court by *Petitioner* (Tr. A256-62). Accordingly, it was the Petitioner's proof as adduced from his expert that the water that allegedly struck Master Blume at the time of his inspection was:

> *". . . several hundred pounds of water moving with a velocity of an express train and if it is confined to a close area, like a funnel, then the effect of the force is even greater."*

And on query by the Court of this witness:

> THE COURT: "Does that water have sufficient impact to cause a lifeboat to become *unstowed?*
> THE WITNESS: Yes.
> THE COURT: *Does it have sufficient impact to bend steel?*
> THE WITNESS: Yes, indeed, sir.
> THE COURT: *Steel?*
> THE WITNESS: Yes, sir."

Petitioner's further proof indicated that:

> Q "What would be the effect, assuming a man were standing in that passageway, *what would be the effect then on him?"*
>
> • • •
>
> A *"The effect would be that the man would be unable to resist the force of the water."*

Finally, from Petitioner's witness, Seaman Kuberski, Petitioner further proved the effects of this very water (Tr. A169):

> Q "What happens when green water hits somebody?
> A *It rips you apart."*

All of the above, adduced only by Petitioner, makes it difficult, in the presence of this unrebutted proof, to understand what role the presence or absence of a guardrail could have had with respect to this case.[8] The Appellate Division so found

In this regard it is to be noted, that with respect to a water tight door, concerning which it had been Petitioner's contention was inappropriately sealed, with the Trial Court's taking this issue from the jury on the basis of the force of the green water that Petitioner's expert described, Petitioner agreed and termed it "judiciously removed" (P.Br. NYCA 28, fn.)

Reasons for Declining the Granting of the Relief Requested by Petitioner

Respondent has never contended that any but the Federal Law governs the instant case. *See* R.Br. NYCA generally, and more particularly, pp. 7, 53-54, 78.

It was the Petitioner, before the New York Court of Appeals (P.Br. NYCA 5), who sought to have applied other than the Federal Law, inasmuch as to reinstate the judgment (P.Br. App. 2d), as reversed by the Appellate Division, would be to permit the addition of prejudgment interest in the amount of $499,255.62, which is in conformity with the law of the State of New York (The Es-

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[8] Ironically, it would appear that the absence of the railing would have made it more likely that Master Blume, assuming that he was able to resist the force of the water, would not have been knocked unconscious.

tates, Powers & Trusts Law, *supra* 2), but in clear derogation of the controlling law, the Federal Law.[9]

While this Respondent has never disputed the applicability of the controlling cases of this Court as they relate

[9] It is clear that in matters of prejudgment interest Federal Maritime Law applies, and preempts. Moore-McCormack Lines, Inc. v. Amirault, 202 F. 2d 893, (1st Cir. 1953); Robinson v. Pocahontas, Inc., 477 F. 2d 1048, (1st Cir. 1973); Newburgh Land and Dock Company v. The Texas Company, 227 F. 2d 732, (2d Cir. 1955). With respect to a jury-tried Jones Act case, it is clear that prejudgment interest may not be awarded. Casey v. American Export Lines, Inc., 173 F. 2d 324, rev'd on other grounds 176 F. 2d 337, (2d. Cir.), cert. denied, 338 U.S. 885 (1949); Cortes v. Baltimore Insular Line, Inc., 66 F. 2d 526, (2d. Cir. 1933); Doucet v. Wheless Drilling Company, *et al.*, 467 F. 2d 336, (5th Cir. 1972); Sanford Brothers Boats, Inc. v. Vidrine, 412 F. 2d 958, (5th Cir. 1969); Parisi v. Lady in Blue Inc., 433 F. Supp. 681, (D.C. Mass. 1977); *see* also Moore-McCormack Lines, Inc. v. Richardson, 295 F. 2d 583, 594, (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962). With respect to Moragne, *supra* 3, it has been said that the award of prejudgment interest rests within the "sound discretion of the trial judge" (however, the instant record makes it clear that the Trial Court exercised no discretion in this case, but rather acted in an ministerial fashion which is appropriate pursuant to New York's Estates, Powers & Trusts Law, *supra* 2), *In re* Sincere Navigation Corporation, 329 F. Supp. 652, 660, (E.D. La. 1971), modified and remanded on other grounds 529 F. 2d 744, (5th Cir. 1976). With respect to the Death on The High Seas Act, *supra* 2, to be considered in conjunction with the jury's failure to at all discount to present value Master Blume's past and future wages (Tr. A1620; Pet.App. 1e, ans. 5), *see* Moore-McCormack Lines, Inc., v. Richardson *supra;* and more recently Sincere Navigation Corporation, *supra;* Dennis v. Central Gulf S.S. Corp., 323 F. Supp. 943, (E.D. La. 1971), aff'd 453 F. 2d 137, (5th Cir.), cert. denied, 409 U.S. 948 (1972). Further, and as much at it is clear that the Petitioner neither requested that the jury be instructed as to an award of prejudgment interest, nor was the jury so instructed, *see* Robinson v. Pocahontas, Inc., *supra;* Newburgh Land and Dock Company v. The Texas Company, *supra;* and Barton v. Zapata Offshore Co., 397 F. Supp. 778, (E.D. La. 1975).

to the quantum of proof necessary in an action instituted pursuant to the Jones Act (R.Br. NYCA 53-54, 58-59), nevertheless, this Court has said, in reversing a state court adjudication of an affirmance of a jury verdict in favor of a decedent's representative that:

> "When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of the respondent that the . . . caused or contributed to cause the death is without any substantial support. *The record leaves the matter in the realm of speculation and conjecture. That is not enough.*" (emphasis added) *Chicago, Milwaukee & St. Paul Railway Company* v. *Coogan, Special Administratrix, etc.*, 271 U.S. 472, 478 (1925).

Moreover, the instant case is not one such as Petitioner suggests, wherein Appellate Courts have substituted their judgment for that of the jury. The theory of the Petitioner before the Trial Court, as set forth, *supra* 3-4, was present from his opening, up to and including the completion of the entire case, when the issue was ultimately withdrawn, for all purposes, from the jury. In toto, the issues concerning the overloading and course of the vessel, and the responsibility therefore, constitute a majority of the voluminous record now before this Court.[10]

[10] Petitioner's theory that the overloading of the vessel proximately caused the Master's loss was again demonstrated by his closing hypothetical question to his expert witness (Tr. A421-37). Petitioner asked in part:

> Q "Do you have an opinion, assuming the previous state of facts, as to whether the vessel *violated its loadline certificate* in being overloaded, in breaking ground at 16,950 tons,

(Footnote continued on following page)

Petitioner's approach throughout the presentation of this case, was consistent with his opening which reflected in part (Tr. A63-73):

> "Finally, during the night of the 15th of December — — remember the captain was lost the 16th. During the night of the 15th of December the *vessel took a severe amount of damage on deck.*"
>
> * * *
>
> "So the vessel is going deeper and damage is sustained, damage on the deck. The night of the 15th — — and it is our position that this damage *would not have been severe* had the vessel not overloaded in Portland in anticipation of proceeding across the ocean to Yokohama."
>
> * * *
>
> "And because the vessel was *overloaded, the overloading caused the progressive loss of buoyancy, the progressive loss of buoyancy caused more damage, and the damage was the reason the captain was out there,* and that is why he was washed over the side inspecting *damage that should not have been there.*"

(Footnote continued from preceding page)

in entering the winter zone at 16,826, and on the 16th of December being 16,482 tons, where the A.B.S. shows - - strike that - - where the capacity booklet shows it at 16,628 and - - 16,628, summer mark, low line, (as in original) and 16,000 winter mark loadline."

* * *

A "I stated that it was *overloaded* on those occasions.

Q And on those occasions of being *overloaded,* can you tell us with a reasonable degree of certainty whether it violated the Safety Regulations upon which loadline certificates are based?"

* * *

A "Yes, it is my opinion."

As the foregoing makes clear, Petitioner had sought to establish that the overloaded condition of this vessel proximately resulted in the Master's death and yet, with the determination of both the Trial Court, and that of the Appellate Division, that this responsibility rested solely in the decedent, he was in complete agreement. Petitioner's approach, as set forth above, was again completely consistent with his statement to the jury with respect to the overloading of the vessel as it related to the Master's demise (Tr. A62-63):

> "You must maintain those marks because when you lose — — when you go down deep in the water you lose buoyancy. *It is a chain reaction.*"

As a result of Petitioner's approach in attempting to fix the responsibility in someone else for the loading, and the course of the S.S. WASHINGTON TRADER, the applicability of *Walker* v. *Lykes Bros. Steamship Co., Inc.,* 193 F. 2d 772, (2d Cir. 1952) was urged. Before the New York Court of Appeals Petitioner was in *full agreement* with the application by the Trial Court of this doctrine[11] (P.Br. NYCA 27). More importantly, although it is Petitioner's position that the judgment of the trier of the facts was supplanted by that of Appellate Courts, this, the most controverted issue in the entire record, with multiple factual determinations, was taken from the jury. With that decision, Petitioner wholeheartedly agreed (Tr. A1486).

Petitioner has recited to this Court its own prior mandate, and suggests that the instant case is one which falls within the ambit of *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500 (1956), as exemplifying a matter wherein (P.Br.

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[11] Before the Trial Court, Petitioner's position was opposite (Tr. A1467): "I'm pointing out to the Court that *the Walker doctrine has been abolished.*"

7) ". . . state courts persistently deprive litigants of their right to a jury determination".

However, one of the primary bases of this Respondent's appeal to the Appellate Division from the judgment below, rested precisely on the Trial Court's withdrawal from the realm of the fact finder, the issues of loading and course setting. Accordingly, this Respondent, in appealing the Trial Court's determination, asked the Appellate Division (R.Br. NYCA 3):

> "May a trial court withdraw from the jury's consideration the acts and activities of the Master which gave rise to his death . . ."

This position was reiterated to the New York Court of Appeals (R.Br. NYCA 60-61), as suggestive of the nullity of the jury's verdict, and the injustice its reinstatement would have provided.

The Evidence of Record

With respect to Petitioner's assertion that there exist in the record before this Court three examples of record evidence, ". . . each of which *independently provides* an adequate basis for the jury's verdict . . ." (emphasis as in original, P.Br. 11), notwithstanding as set forth, *supra* 5, that there could be no adequate basis, each of Petitioner's contentions shall be considered.

The question simply stated is whether the damage resulted from the vessel's broaching to, or was the severe damage as Petitioner contended in the Court below, *supra* 12, a result of the *overloaded condition* of the vessel *at the time of the broaching to.* While Petitioner sets forth that (P.Br. 13) ". . . the jury could have found that Master

Blume's death was, at least in part, the result of the . . . steering mechanism.", Petitioner further notes that (P.Br. 13, fn. 19):

> "The trial court . . . properly instructed the jury on the need for 'a direct causal relationship between the defect complained of and the ultimate loss.'"

Accordingly, Petitioner is in agreement that the burden in a seaman's case, as referrable to a seaworthiness claim, is entirely different from the quantum of proof necessary in a Jones Act case. This distinction is in accord with both Benedict[12] and Norris[13].

Moreover, while Petitioner indicates that the jury was specifically instructed that the loss of the rudder control constituted an unseaworthy condition, his further statement that (P.Br. 12, fn. 18) ". . . neither of the New York appellate courts expressed any disagreement with this instruction.", certainly does not demonstrate the approval by either of those Courts of this instruction, since neither had occasion to ever reach this issue.[14]

With respect to the second of Petitioner's contentions, as it relates to the allegedly defective guardrail (P.Br. 13), it is to be noted, in the first instance, that the Appellate Division did not deal with the presence or absence of guardrails. It dealt *solely* with the absence of prox-

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[12] I. Hall, A. Sann, S. Bellman, BENEDICT ON ADMIRALTY, 7th. Ed., Vol. IB, § 28, at 3-162 (1976).

[13] M.J. Norris, THE LAW OF SEAMEN, 3rd. Ed., 2d Vol. § 624, at 196-97; § 690 at 374-75 (1970).

[14] The appropriateness of this instruction was contested on the authority, *inter alia,* of Savard v. Marine Contracting, Inc., 471 F. 2d 536, (2d Cir. 1972), cert. denied, 412 U.S. 943 (1973); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); cf. R.Br. NYCA 54-58.

imate cause. Moreover, the Appellate Division's finding was somewhat broader than as contained in Petitioner's brief (P.Br. 13). The Appellate Division stated (P.Br. App. 3a):

> "As for the specification of unseaworthiness based on a broken or bent storm railing on the poop deck, *there simply is no proof that any defective railing was a proximate cause of the Master's loss.* There is no proof even that Master Blume went overboard in an area where the railing was defective. *In fact, plaintiff's expert testified that the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea.* Therefore, any finding that a defective storm railing on the poop deck contributed to the Master's loss is *sheer speculation.*" (emphasis added)

There was controverted evidence as to whether any railing on the port side of the poop deck was damaged. However, the Appellate Division's finding was two-fold. Indeed, not only did the Appellate Division state that (P.Br. App. 3a): "There is no proof even that Master Blume went overboard in an area where the railing was defective.", but that in connection with the testimony of Petitioner's expert, the presence or absence of a guardrail was not causative in that ". . . the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea." A contrary finding could only be sheer speculation.

In a case wherein the Court had occasion to reverse a trial court's dismissal of a seaman's case in a matter involving lifelines, Judge Hand reflected:

> "Nobody could, in the nature of things, be sure that the intestate would have seized the rope,

> or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it. We cannot say that there was no likelihood that a rope three feet above the deck made by the timber would not have saved the seaman. *In this connection we note that the ship did not take aboard green water, but that the bluff of the bow broke the force of the sea shipped, which, when it reached the deck load, was made up of white water, and was not big enough to lift up a man's body.*" (emphasis added) *Zinnel* v. *U.S. Shipping Board Emergency Fleet Corporation,* 10 F. 2d 47, 49, (2d Cir. 1925).

To be noted in the above portion of *Zinnel,* is a fact pattern precisely the *opposite* of that of the instant case. The S.S. WASHINGTON TRADER did *take aboard green water,* and that which allegedly struck Master Blume was a funnel of incredibly forceful water capable of bending steel, *supra* 8.

Indeed, while Judge Hand instructed that the white water present in *Zinnel* ". . . was not big enough to lift up a man's body.", Seaman Kuberski[15] informs us in the case at bar that the green water which struck Master Blume ". . . rips you apart" (*supra* 8).

Moreover, in a case involving the loss of a crewman, wherein a specification of unseaworthiness was alleged, based upon dislocated stantions of a guardrail, which alleged break in protection only *twenty steps* from the seaman's station, allowed him to go over the side, the Court indicated:

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[15] This testimony was, of course, uncontradicted. Boat Dagny v. Todd, 224 F. 2d 208, 209, (1st Cir. 1955).

> "Guided by the prescriptions of *Chicago, Milwaukee & St. Paul Railway Company* vs. *Coogan,* 271 U.S. 472 (1926), our judgment is that when the facts, and the conclusions which a jury might fairly draw from them, are *taken most strongly against the shipowner, the plaintiff's contention that the slack in the chain accounted for or contributed to Swords' death is 'without any substantial support. The record leaves the matter in the realm of speculation and conjecture'* (at 478). *This is not enough to justify submission of the issue of causative unseaworthiness to the jury.*" (emphasis added) *Swords* v. *American Sealanes, Inc.,* 443 F. 2d 1324, 1325, (4th Cir.), *cert. denied,* 404 U.S. 948 (1971).

Also to be noted is that Petitioner did not adduce any proof in the Trial Court with respect to whether Master Blume could even swim. It further appears he wore no life jacket, although one was available (Tr. A920).

Finally, Petitioner cites the Appellate Division as baldly asserting that (P.Br. 14):

> "(t)here is no evidence that the crew members should have known that the Master was washed overboard".

However, what immediately precedes this indication by the Appellate Division is worthy of note (P.Br. App. 4a):

> "As for the claims of negligence we find neither fault nor proximate cause *even if fault exists*". (emphasis added)

Accordingly, Petitioner's contention with respect to the alleged failure of the crewmen to respond to the Master's

peril, and the alleged failure of the chief officer to act, are both resolved by the record before this Court solely in terms of proximate cause.

As a threshold determination, it is to be noted that notwithstanding Petitioner's assertion before the New York Court of Appeals (P.Br. NYCA 44), the record is *devoid of any evidence that would even suggest that Master Blume died as a result drowning.*

While[16] *Abbott* v. *United States Lines,* 512 F. 2d 118, (4th Cir. 1975), citing *Gardner* v. *National Bulk Carriers, Inc.,* 310 F. 2d 284, (4th Cir. 1962), *cert. denied,* 374 U.S. 913 (1963), spoke to the issue of rescue, the Court concluded at 119:

> "We hold that if there is a *reasonable possibility* of rescue, a ship[17] is under a duty to search and attempt a rescue . . ." (emphasis added)

Not only did the Petitioner fail to demonstrate any indices in the Trial Court which would support a finding that Master Blume could have survived even momentarily, but rather the proof demonstrated that in all probability he could not have survived.[18]

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[16] Cf. dissenting opinion of Judge Fuchsberg (Pet. App. 4b-5b).

[17] The Abbott Court, at 121, was clear in its admonition that this "controlling principle" runs to the knowledge of the vessel's *officers.*

[18] It should be noted that Petitioner advanced before the New York Court of Appeals his contention that the search for Master Blume was less than thorough (P.Br. NYCA 60). It is to be noted that while this was Petitioner's position before that Court, it is submitted, that neither was it suggested to the jury by the Trial Court's charge that the activities of Mate Perkins at the site of the Master's alleged loss were in any way deficient, nor was it advanced as a claim of negligence in the discussions had during the precharge session (Tr. A1528-50).

With respect to Petitioner's contention that Seaman Kuberski's testimony perhaps "compels" the inference of non-officer crew negligence (P.Br. 14-15), perhaps from Seaman Kuberski's other testimony,[19] the inference is also compelled that there was never any possibility of rescue, let alone a reasonable one. Seaman Kuberski testifying about the seas on the day in question indicated (Tr. A178): *"In this sea there is no sense going back because nobody could live in this water five minutes."*

As to Petitioner's claim (P.Br. 14, fn. 22), that Mate Perkins found it "impossible" to string lifelines as to those railings he found "damaged[20] or missing", it is respectfully submitted that this is somewhat of an understatement of Mate Perkins' testimony (Tr. A911-12). Moreover, Petitioner's citation to the record does not reflect Mate Perkins saying only that it was "impossible" but rather, to have done so would be *"Murder if you did"*. Accordingly, the ability of the crew of the S.S. WASHINGTON TRADER to have done this in the past, can have no relevance with respect to their ability to have done so at this time, given Mate Perkins' testimony as to the weather,

[19] It is also to be noted that notwithstanding Petitioner's assertion that ". . . Kuberski reported to Chief Mate Perkins what he had seen . . ." (P.Br. 15), Mate Perkins testified that he had no recollection of any aspect of this conversation (Tr. A760).

[20] It is to be noted that Mate Perkins' testimony was that no damage was found to the railing of the port side of the poop deck (Tr. A725). Moreover, none was known to him to have occurred at any time during the voyage (Tr. A914).

the seas,[21] and the offense it would have constituted to have directed the crew accordingly.

Notwithstanding this, Petitioner states (P.Br. 14, fn. 22): "From such evidence, the jury was entitled to infer negligence on the part of the crew . . ." Given the foregoing recitation of the evidence of record, it is at best difficult to understand from what the jury would have drawn this inference.

The Decisions Below Represent the Appropriate Disposition of the Instant Matter

What is set forth above, particularly the affirmative acts of the decedent himself, make it clear that the disposition of the Appellate Courts below was appropriate.

Finally, while petitioner notes (P.Br. 18):

> ". . . and thus the decision below . . . could seriously impact large numbers of cases in which *seamen* seek to exercise their federally guaranteed right . . ." (emphasis added)

It is submitted that the matter before this Court involves the *individual* charged with the bringing of this vessel, the S.S. WASHINGTON TRADER, over the open seas safely to its destination. It seeks recovery on behalf of the very *steward* of that vessel.

[21] In this connection, the Court's attention is respectfully directed to the ship log for the time at issue (Exhibit 7, Tr. A1727), which reflects, that with respect to 3:15 a.m. on December 16th, the nearest Beaufort Scale readings and sea indications demonstrating the intensity of the wind and seas were for 12:00 a.m.: 8 on the Beaufort Scale with very rough seas; and 4:00 a.m.: reflecting 7-8 and very rough seas.

CONCLUSION

It is respectfully requested, based upon all the foregoing, that this Court decline to grant the application of the Petitioner.

Respectfully submitted,

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APPENDIX A

Judgment Entered on Appeal to Appellate Division

(Filed—May 3, 1978)

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

INDEX No. 19530/67

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the Estate of CARL P. BLUME, Deceased,

Plaintiff-Respondent,

—against—

AMERICAN TRADING AND PRODUCTION CORPORATION,

Defendant-Appellant.

The above entitled action having duly come on for trial before Honorable Judge Edward J. Greenfield, and a jury, at a Trial Term, Part 22 of the Supreme Court, held in and for the County of New York, at the Courthouse 60 Centre Street, in the City of New York, on April 25, 26, 27, 28, 29 and May 2, 3, 4, 5, 6 and 9, 1977, and the plaintiff having appeared by Kenneth Heller, Esq., and the de-

Appendix A

fendant having appeared by D'Amato, Costello & Shea, Joseph M. Costello, of counsel, and the issues having been duly tried; and the jury having rendered a special and general verdict in favor of the plaintiff against the defendant American Trading and Production Corp., on May 9, 1977, in the amount of $808,536.00, and the jury having found 10% contributory negligence on the part of the decedent, and the Court having fixed the sum of 90% of $808,536.00 at $727,682.40, with interest to run from December 16, 1966, and the Court having denied the motions by defendant to set the verdict aside, and the costs and disbursements of the plaintiff having been taxed in the sum of $582.10, and it having been adjudged

That the plaintiff, Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the Estate of Carl P. Blume, Deceased have judgment against the defendant, American Trading and Production Corp., on the issues tried and it having been further adjudged

That the plaintiff, Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the Estate of Carl P. Blume, Deceased, of 31 Chambers St., N.Y.C. recover of the defendant American Trading and Production Corp., residing at 555 Fifth Avenue, New York, New York the sum of $727,682.20, together with the sum of $499,255.62, representing interest thereon from the 16th day of December 1966, together with the sum of $532.10/100 costs and disbursements as taxed, making a total sum of $1,277,420.12/100, and the substance of the foregoing having been filed with the Clerk of this Court, by the plaintiff as his judgment on May 17, 1977, and American Trading and Production Corp. having appeared therefrom

Appendix A

And the appeal having come on before the Appellate Division of the First Department during the February term of 1978,

And the Appellate Division First Department by its Order dated April 20, 1978 reversing on the law, without costs and disbursements, the aforementioned judgment entered May 17, 1978 and having vacated same and having ordered that the complaint of the plaintiff be dismissed, is hereby

Adjudged that Judgment in this matter be entered and the same is hereby entered in favor of the defendant, American Trading and Production Corp. dismissing the complaint and it is hereby further

Adjudged that the Judgment filed May 17, 1977, and so appealed from be and the same is hereby reversed and is hereby vacated.

Dated: New York, New York
May 2, 1978

Norman Goodman
Clerk

APPENDIX B

Judgment Entered on Appeal to Court of Appeals

(Filed—January 11, 1980)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

INDEX No. 19530/67

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the Estate of CARL P. BLUME, Deceased,

Plaintiff-Appellant,

—against—

AMERICAN TRADING AND PRODUCTION CORP.,

Defendant-Respondent.

The above entitled action having come on to be heard before the New York Court of Appeals, on October 9, 1979, and that Court, after due deliberation, having ordered and adjudged, by an order dated November 27, 1979 that the Order of the Appellate Division, First Judicial Department dated April 20, 1978 be affirmed with costs, now, it is hereby

Appendix B

ADJUDGED, that the order of the Appellate Division dated April 20, 1978 and the Judgment entered on May 3, 1978, is hereby affirmed, and it is further

ADJUDGED, that the defendant-respondent, American Trading and Production Corp. recover of the plaintiff, Thomas I. Fitzgerald, Public Administrator of the Estate of Carl P. Blume, deceased, the sum of $2,748.97, inasmuch as costs and disbursements have been taxed, and that the defendant-respondent have execution therefore.

Judgment entered and signed this 11th day of January, 1980.

NORMAN GOODMAN
Clerk

APPENDIX C

The Death on the High Seas Act, 46 U.S.C. §761 provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued.

The Loadline Law, former 46 U.S.C. §85c provided:

It shall be unlawful for any vessel subject to sections 85-85g of this title and to the regulations established thereunder to be so loaded as to submerge, in sea water, the load line or lines marked pursuant to said sectors and to the regulations established thereunder applicable to her voyage; or so as to submerge under like conditions the point where such load line or lines ought to be marked pursuant to the provisions of said sections and of the regulations established thereunder; or so as in any manner to violate the said regulations.